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No. 97-2046

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

SUPERVALU INC. and MORAN FOODS, INC.,
d/b/a SAVE-A-LOT, LTD.,
Petitioners,

v.

DISCOUNT FOODS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

In the proceeding below, the Alabama Supreme Court erroneously reversed an order of the trial court which required the parties to arbitrate Respondent Discount Foods, Inc.'s ("Discount Foods") intentional tort claims against Petitioners Supervalu Inc. and Moran Foods, Inc. d/b/a Save-A-Lot, Ltd. (collectively "Supervalu").* Alabama's highest court held that although the language of the arbitration agreement between the parties is extremely broad, it does not encompass Discount Foods' intentional tort claims because "to hold otherwise would allow persons signing broad arbitration clauses to commit intentional torts against one another . . . without concern that they might have to answer for their actions before a jury of their peers." Pet. App. 4a. On June 18, 1998, Super-

* The parent companies and non-wholly owned subsidiaries of the Petitioners are listed at p. ii of the Petition.

valu and Save-A-Lot filed a Petition for a Writ of Certiorari with this Court, requesting review of the decision of the Alabama Supreme Court. On July 17, 1998, Discount Foods filed a brief in opposition to the petition. One of Discount Foods' primary arguments is that the parties could not have intended to arbitrate Discount Foods' intentional tort claims because the events which gave rise to those claims occurred before Discount Foods signed the arbitration agreement at issue. As Supervalu demonstrates herein, Discount Foods' argument is irrelevant as a matter of fact and incorrect as a matter of law.

I. THE ARBITRATION AGREEMENT COVERS DISCOUNT FOODS' INTENTIONAL TORT CLAIMS, WHICH DISCOUNT FOODS ASSERTED AGAINST THE DEFENDANTS AFTER THE PARTIES AGREED TO ARBITRATE ANY CLAIM OR CONTROVERSY ARISING BETWEEN THEM.

The arbitration clause in the contract between Discount Foods and Supervalu provides that the parties will arbitrate, "[a]ny controversy or claim arising between [them], including, *but not limited to,* disputes relating to this Agreement." Pet. App. 16a (emphasis added). Discount Foods argues that it could not have intended for its intentional tort claims against Supervalu to be arbitrated because the event out of which the claims arose, Discount Foods' lost bid for a grocery store lease, occurred before the parties signed the Retailer's Agreement that contains the arbitration clause. Opposition pp. 4-5. This issue was not addressed in the proceeding before the Alabama Supreme Court, and it is not cited as a basis for that court's opinion. Even though Discount Foods did not argue this issue in the court below, it is easily refuted.

Discount Foods signed the contract containing the arbitration agreement on February 10, 1995.[1] Pet. App. at

[1] Supervalu executed the Retailer's Agreement on February 24, 1995.

19a. Discount Foods did not file suit against Supervalu and the other defendants until May 7, 1996. Therefore, although the events out of which this controversy arose occurred before the parties executed the Retailer's Agreement, Discount Foods initiated its claims against the defendants after the parties finalized their arbitration agreement. The lawsuit clearly is a "claim arising between the parties," which must be arbitrated, according to the plain language of the arbitration agreement.[2]

II. COURTS REQUIRE PARTIES TO ARBITRATE CLAIMS RELATING TO EVENTS THAT OCCURRED BEFORE THE PARTIES SIGNED THEIR ARBITRATION AGREEMENT IF THE PARTIES INTENDED TO ARBITRATE THOSE DISPUTES.

Courts routinely require arbitration of claims arising out of events that occurred before the parties executed their arbitration agreement if the language of the arbitration clause encompasses those claims. For instance, the Eleventh Circuit Court of Appeals held that a plaintiff's claims were arbitrable under a brokerage contract that included an arbitration agreement even though the claims were based on events which transpired before the parties signed the brokerage contract. *Belke v. Merrill, Lynch, Pierce, Fenner & Smith*, 693 F.2d 1023, 1028 (11th Cir. 1982), *abrogated on other grounds, Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985). The court of appeals reasoned that:

> [b]y its own terms the contract between the parties covers not only disputes arising out of the agreement, but in the disjunctive includes "any controversy between us arising *out of your business.*"

Id. (emphasis supplied by the court). The court concluded that the broad arbitration clause, "evince[d] a

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[2] Justice Houston, in his dissent to the Alabama Supreme Court's opinion below, specifically found that Discount Foods' lawsuit against Supervalu and the other defendants constituted a "dispute" which the parties agreed to arbitrate. Pet. App. 6a.

clear intent to cover more than just those matters set forth in the contract." *Id.* The fact that the claims arose from acts occurring before the execution of the brokerage agreement was not relevant. *Id.*; *see also, R.M. Perez & Associates, Inc. v. Welch,* 960 F.2d 534, 539 (5th Cir. 1992) (rejecting plaintiff's contention that his claims were not subject to arbitration because the transactions which provided the basis for his claims were completed before the parties executed the agreement containing an arbitration clause). Thus, as with all other matters relating to arbitration, the parties' intent controls the determination of whether a dispute relating to events which took place before the arbitration agreement was signed falls within the scope of the arbitration clause. *See Dean Witter Reynolds Inc. v. Prouse,* 831 F. Supp. 328, 331 (S.D.N.Y. 1993) ("courts routinely enforce retroactive arbitration agreements when, as in the case at bar, this is consistent with the parties' intentions"); *Clark v. Kidder, Peabody & Co.,* 636 F. Supp. 195, 197 (S.D.N.Y. 1986) ("It is irrelevant that the transaction at issue occurred before this modification [adding the arbitration clause] was effected"); *Shotto v. Laub,* 632 F. Supp. 516, 523 (D. Md. 1986) ("[W]hether plaintiffs signed the agreements before or after opening their accounts, or even before or after the claims arose, does not change the fact that they signed written agreements to arbitrate claims arising out of their account").

III. THE UNAMBIGUOUS LANGUAGE OF THE ARBITRATION AGREEMENT AT ISSUE DICTATES THAT DISCOUNT FOODS MUST ARBITRATE ITS INTENTIONAL TORT CLAIMS AGAINST SUPERVALU.

Supervalu and Discount Foods agreed to arbitrate "[a]ny claim or controversy" arising between them, "including, but not limited to, disputes relating to" the Retailer's Agreement in which the arbitration clause appears. Under Alabama law, the parties' intent must be gleaned from

the plain language of the arbitration agreement. *Allied-Bruce Terminex Cos., Inc. v. Dobson,* 684 So. 2d 102, 110 (Ala. 1995) (question of contract interpretation is guided by parties' intent which is evidenced by plain language of arbitration clause); *see also Ryan Warranty Services, Inc. v. Welch,* 694 So. 2d 1271, 1273 (Ala. 1997) (deriving intent of the parties from the words of the contract). Supervalu and Discount Foods did not limit their agreement to arbitrate to claims relating to events that occurred after execution of the Retailer's Agreement, and they did not exclude intentional torts from the scope of their arbitration agreement. To read these limitations into the agreement would frustrate the parties' intent.[3] The Alabama Supreme Court's refusal to enforce an agreement to arbitrate intentional tort claims because of the court's preference for a judicial forum is improper in the face of the overriding policies behind the Federal Arbitration Act. *See First Options of Chicago, Inc. v. Kaplan,* 115 S. Ct. 1920, 1925 (U.S. 1995) (stating that the basic objective of the FAA is to ensure that commercial arbitration agreements are enforced according to their terms). Petitioners respectfully request that the Court grant the Petition for Writ of Certiorari to correct the decision of the Alabama Supreme Court and confirm the policies underlying the Federal Arbitration Act. An agreement to arbitrate a claim, even an intentional tort claim, should be recognized and enforced. The petition for writ of certiorari should be granted.

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[3] Discount Foods criticizes Supervalu for arguing in favor of a "literal" interpretation of the arbitration agreement between the parties. Opposition at p. 5. Because the language of the agreement is unambiguous, the agreement must be enforced according to its literal terms to effectuate the parties' intent.

Respectfully submitted,

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